Petition

81-1841

Supreme Court, U.S.
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ALEXANDER L. STEVAS
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No._____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

CHARLIE E. CONWAY,
Petitioner,

VS.

THE STATE OF OKLAHOMA,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

QUESTION NO. ONE

Did the failure of the trial and appellate court to strike the non-statutory word "trapping" from the court papers conflict with the decisions of this Court in *Graham v. Weeks*, 1890, 138 U.S. 461, 11 S.Ct. 363, 34 L.Ed. 1051, quoted and reaffirmed in *Weems v. United States*, 1909, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793, and render the conviction void; and, if the conviction was void, was the conviction thereby rendered repugnant to the due process clause of the 14th Amendment and in conflict with the decision of this Court in *Scott v. McNeal*, 1893, 154 U.S. 24, 14 S.Ct. 1108, 38 L.Ed. 896?

QUESTION NO. TWO

Was the construction by a plurality of the Justices of the Court of Criminal Appeals of the State of Oklahoma of the word *seine* in Title 29, § 6-401-A-1, Oklahoma Statutes, "that with modern fishing techniques the *ordinary* meaning of the word "seine" has *expanded* to include several different types of fishing nets", (emphasis added), an *after-the-act unfair notice* to the accused of conduct made criminal, and thereby was rendered repugnant to the 14th Amendment due process clause and in conflict with the decision of this Court in *Bouie v. City of Columbia*, 1964, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894?

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No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CHARLIE E. CONWAY,
Petitioner,

VS.

THE STATE OF OKLAHOMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

The petitioner prays that a writ of certiorari issue to review the judgment of affirmance and sentence of the Court of Criminal Appeals of the State of Oklahoma.

OPINION BELOW

The opinion below was ordered to not be published. There is no official or unofficial report of it other than the one filed in the clerk's office at Oklahoma City and copies thereof furnished to counsels. A true and correct copy of it is annexed to this petition as Appendix A, page A1.

GROUNDS FOR THIS COURT'S JURISDICTION

The date of the judgment and sentence sought to be reviewed and the time of its entry is November 16, 1981. A true and correct copy of it is annexed to the petition as Appendix A, page A3.

The date of the order denying this petitioner's motion for rehearing is January 4, 1982. A true and correct copy of it is annexed to the petition as Appendix C, page A14.

28 U.S.C. § 1257 (3) is believed to confer on this Court jurisdiction to review the judgment of affirmance by writ of certiorari.

The reviewing jurisdiction of this Court is grounded upon a lack of 14th Amendment due process, in the procedural sense, as to each of two points of complaint made to this Court complaining of the allegedly erroneous refusal of both the trial and appellate courts of Oklahoma, first, to strike from the court papers the word "trapping" for the reason that to leave it in in the court papers allowed Oklahoma to charge and convict the petitioner for a crime that never existed under any Oklahoma criminal statute.

The second point of complaint made to this Court, complains of allegedly erroneous refusal of the highest appellate

criminal court of Oklahoma to exempt the petitioner from its first interpretation of the meaning of the word "seine" as used in the criminal statute said to have been violated by the petitioner. The effect of such construction was, for the first time, to give the petitioner fair notice of what conduct the statute made criminal. The statutory construction of the meaning of the word "seine" by the highest criminal appeal court, for the first time, made criminal action out of what previously was not known to the petitioner to be criminally inhibited. The petitioner timely protested against the refusal to exempt him from the new construction by his motion for rehearing, asserting therein that the new construction, as applied to him, invaded his 14th Amendment due process, citing this Court's decision in *Bouie v. City of Columbia*, supra, in that such construction operated as an ex post facto specie of notice to him of what conduct was criminal.

The answers to these two complaints draw in question the issue of whether Oklahoma has invaded petitioner's 14th Amendment due process. That fact grounds this Court's reviewing jurisdiction.

THE PROVISIONS OF THE OKLAHOMA STATUTE AND THE UNITED STATES CONSTITUTION THAT ARE INVOLVED IN THIS CASE

This case involves subsection A-1 of Title 29, § 6-401-A-1 Oklahoma Statutes. The entire section 6-401 is set out verbatim as Appendix F, page A20.

The case also involves the due process clause of the 14th Amendment, United States Constitition. That clause is set out vertabim as Appendix G page A22.

STATEMENT OF THE CASE AND FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTION PRESENTED

Petitioner was convicted of violating Title 29, § 6-401-A-1, Oklahoma Statutes, by the act of seining minnows with a seine over 40 feet in length. He was punished by the assessment of a fine of $200.00 and confinement in the county jail for 10 days. The Court of Criminal Appeals of the State of Oklahoma affirmed the conviction by a plurality vote with one of the three Justices dissenting. The order of affirmance and dissent is annexed as Appendix A, page A 3. Petitioner's petition for rehearing, annexed as Appendix B, page A5, was denied. The order of denial is annexed as Appendix C, page A14. The Oklahoma appellate Court stayed its mandate in order for petitioner to petition this Court for a writ of certiorari. That order is annexed as Appendix E, page A18.

The written information, charge to the jury, verdict, judgment and sentence in this case, (hereinafter called "court papers"), arose from under the following subsection one of Title 29, § 6-401-A-1, Oklahoma Statutes:

> "Part 4. Minnow Dealers
>
> "§ 6-401. Operating provisions for minnow dealers
>
> "A. No person may seine, trap, transport and/or sell any minnows within this state without having a valid minnow dealer's license unless exempted under Section 4-116 and without observing the following requirements:
>
> "1. No seines used for seining minnows may have a mesh larger than one-fourth (1/4) inch square, and no such seine shall be longer than forty (40) feet in length."

* * *

> "B. Any person convicted of violating the provisions of this section shall be fined not less than One Hundred Dollars ($100.00) nor more than Two Hundred Dollars ($200.00), or confined in the county jail for a period not to exceed thirty (30) days, or by both such fine and imprisonment."

No Oklahoma law criminally or civilly inhibits a licensed commercial minnow dealer from trapping minnows.

The court papers in this case all used the following words: "seining and trapping minnows with a seine over 40 feet in length". The word "trapping" is not found in the statute said to be violated.

All of the evidence, which was undisputed and which was introduced by the State to prove that the accused seined minnows with a seine over 40 feet in length, showed that the "contraption"[1] used by the accused was a stationary barrier, anchored by steel stakes driven in the river bottom, across the flowing, shallow water of a river. The stationary barrier was made of nets that had no floats on top or sinkers on the bottom. This stationary net barrier caused minnows, that moved up-stream, to swim through a cone-shaped "throat" in the net barrier into an enclosure made of net from which they could not escape. See Appendix I, p. A26.

Appendix I, p. A26, contains photographs of the instrumentality in question. They are State's Exhibits Numbered 2, 3, 4 and 5.

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[1] "Contraption" is the descriptive word used by Mr. Justice Brett in his dissent to describe what the purality held was a "seine". Mr. Justice Brett held the contraption was a "minnow trap."

In general and with respect to timeliness of raising federal question Number Two, the case of *Brinkerhoff Faris Trust & Sav. Co. v. Hill*, 1929, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 is relied upon to sustain this Court's jurisdiction.

This case was instituted on April 22, 1979. The appeal court below rendered its opinion on November 16, 1981. These dates are stated to show the time relation between the date of petitioner's act and the date the statute in question was construed by the Criminal Court of Appeals of the State of Oklahoma.

The state conceded that petitioner was a licensed minnow dealer. T. E. p. 59.

Facts that support this Court's jurisdiction of Question No. One

In the court of first instance, petitioner moved, (T. R. [transcript of record – Clerk's file] p. 3), for an order striking the words "& trapping" from the information on the grounds that it stated an offense not within the scope of Title 29, § 6-401-1. Before trial started this motion was overruled. (T.R., p. 3) It was renewed by an objection to section number 1 of the court's charge to the jury. (T.R., p. 11) It was carried forward into the motion for new trial in sections 1, 4 and 6 and denied. (T.R., p. 19) It was maintained in the Criminal Court of Appeals by sections 1 and 6 in the petition in error. It is annexed as Appendix H, page A23. It was specified as an error in petitioner's original brief filed in the state appellate court. Petitioner's brief, p. 2. It was argued therein on pages 5 through 8 and at page 17. Question No. One, as a specification of error in the appellate court below, was not specifically

addressed by the court, (opinion, Appendix A, p. A1), and was necessarily denied by implication by affirmance of the conviction.

Question No. One, as a specification of error, upon specific federal grounds, was first urged in the petitioner's brief in the appellate court below at page 2. It was argued from page 5 through 8. Authorities were cited in support thereof at page 17. Because it was not specifically addressed in the appellate court's opinion, it was urged as grounds number two in petitioner's petition for rehearing. Appendix B, p. A11.

Facts that support this Court's jurisdiction of Question No. Two

This question arose for the first time in the Criminal Court of Appeals of the State of Oklahoma. It was there manifested by the court's opinion. Appendix, p. A1. That court said therein this:

> "The statute does not define the word "seine" or "seining". Therefore we must interpret the word in its *ordinary everyday meaning* to give effect to the general purpose of the statute." Opinion, Appendix A, p. A1.

After then quoting from Webster's New Collegiate Dictionary the definition of the word "seine", the court said this:

> "Webster's definition of a seine describes the type of net used since Biblical times. We find that with modern fishing techniques the *ordinary meaning* of the word "seine" *has expanded* to include several different types of fishing nets." *Id.* (All emphasis added.)

Question No. Two, as a specification of error, upon specific federal grounds, was first urged in the petitioner's motion for rehearing in the Criminal Court of Appeals of Oklahoma. Appendix B, p. A5. The rule of *Bouie v. City of Columbia*, 1964, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894, of this Court, was therein specifically called to the court's attention and its controlling applicability was shown. Without comment, the appellate court below rejected the suggested application of the rule of *Bouie's Case*, by an order denying the petitioner's motion for rehearing. Appendix C, p. A14.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Question No. One

It is a necessarily required implied holding by both the trial court and the highest appellate court of Oklahoma that the petitioner could be convicted of a crime that never existed under the laws of Oklahoma.

In each of the court papers, to-wit: the information, an instruction to the jury, verdict of the jury, judgment and sentence, the following words were used: *seining and trapping minnow* in violation of the statute in question. (The information is found in the T.R. at p. 4; the instruction at p. 11; the verdict at p. 16; and judgment and sentence at p. 22.) The statute in question does not make *trapping minnow* an offense.

Thus, petitioner has been convicted of two misjoined offenses; (i) *seining minnows* with a seine over 40 feet in length; and, (ii) *trapping minnows* with a seine over 40 feet in length. Misjoined offense number (i) is a legal offense. Misjoined offense number (ii) is not a legal offense.

The implied approval of such misjoinder by Oklahoma's highest criminal appellate court *operates* as a decision by that court that 14th Amendment due process has *not* been invaded. Therein, the lower appeal court has decided a federal question of law.

The decision *conflicts* with the three following applicable decisions of this Court: *Graham v. Weeks*, 1890, 138 U.S. 461, 11 S.Ct. 363, 34 L.Ed. 1051, quoted and reaffirmed in *Weems v. United States*, 1909, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793. These two decisions command a holding that the conviction was *void*. *Scott v. McNeal*, 1893, 154 U.S. 24, 14 S.Ct. 1108, 38 L.Ed. 896, applies 14th Amendment due process to such a situation.

The lower court's plurality has refused to follow the general rule recognized in *Graham v. Weeks*, supra, quoted and affirmed in *Weems v. United States*, supra, (30 S.Ct. 544, at 555),

"that a judgment rendered by a court in a criminal case must conform *strictly to the statute*, and that any variation from its provisions, either in the character or the extent of punishment inflicted, *renders the judgment absolutely void*." (Emphasis added.)

The writ should be granted in order that the supreme law of the land be enforced by this national Supreme Court.

Alternatively, if there be no conflict between the opinion and judgment below and the cited decisions of this Court, then a State court has decided that the accused can be convicted of a non-legal offense which creates an important question of federal constitutional law which has not been, but should be, settled by this Court.

One hallmark that due process commands is fundamental fairness in the trial of a criminal case. That fundamental fairness is lacking in this case. Trapping minnows by this commercially licensed petitioner was a perfectly lawful act. By allowing criminal conduct – seining minnows with an overlength minnow seine – to be misjoined with innocent conduct, right and wrong were allowed to unfairly become intertwined for trial. It opened the door to jury misconception, an unfairness that the trial judge refused to control by refusing to strike the misjoined innocent conduct. That ruling was affirmed. It sufficiently entangled the issues for decision in the state appeal court with the result that the Justices of that court were unable to reach a common decision.

Question No. Two

In this case the Criminal Court of Appeals of Oklahoma has decided a federal question in a way that is in conflict with the decision of this Court in *Bouie v. City of Columbia*, 1964, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894.

Fair notice from the criminal statute in question of *what conduct* is thereby made criminal is the process due the petitioner by the 14th Amendment. *Bouie*, supra.

Oklahoma hailed the petitioner into its criminal court to answer for his conduct that occurred on April 22, 1979. See amended information, T.R. p. 4. As the appeal court below noted in its opinion, the word "seine" in the statute had no statutory definition. Moreover, in Oklahoma it had never been construed by any court or, at least, it can be so presumed to have no prior court construction in that State since the opinion refers to none. Research by petitioner's counsel failed to locate any prior court construction of the word "seine" in Oklahoma. In 1893, in Indiana, the word "seine" had been defined in *State of Indiana v. Lewis*, 134 Ind. 250, 33 N.E.

1024, 20 L.R.A. 52. That court cited and quoted the definition of Webster's and Century's Dictionary. By silence, the Oklahoma appeal court rejected this definition, for it was cited to this court in petitioner's brief, p. 6 and recalled to the court's attention in petitioner's motion for rehearing. Appendix B, p. A5.

The statute, referring to a seine used for seining minnow, notified the petitioner that "no such seine shall be longer than forty (40) feet in length." Title 29, § 6-401-A-1, Oklahoma Statutes.

The opinion of the court below noted that in Webster's New Collegiate Dictionary "seine" is defined as "a large net with sinkers on one edge and floats on the other that hangs vertically in the water and is used to enclose fish when its ends are pulled together . . ." "Seining" is defined "to catch fish with a seine." In addition, the opinion noted that "we must interpret the word in its ordinary everyday meaning to give effect to the general purpose of the statute." Correctly, the court below noted that petitioner's "pivotal argument is that he was not using a seine and therefore his conduct did not come within the purview of 29 O.S.Supp. 1974, § 6-401 (A) (1). He further argues that his acts constituted the trapping of minnows which is not prohibited by Oklahoma law."

The rationale of the court's affirmance by a plurality of the Justices is stated as follows: "Webster's definition of a seine describes the type of net used since Biblical times. We find that with modern fishing techniques the *ordinary* meaning of the word "seine" has *expanded* to include several different types of fishing nets." The court then concluded that there was evidence that authorized a jury to conclude that petitioner was "using a "seine" greater than forty feet in length". (Emphasis added.)

The court's construction of the word "seine" was made public on November 16, 1981, by filing the same in the Clerk's office and mailing a copy to counsels of record with a notation "NOT FOR PUBLICATION". Whether the court's construction binds the public in general is not involved, but most certainly it does bind the petitioner.

It is patent that the appeal court EXPANDED the ORDINARY meaning of the word *seine*. MR. JUSTICE BRETT dissented, being of the view that the "contraption" was a minnow trap and not covered by the statute.

Petitioner agrees with MR. JUSTICE BRENNAN'S position stated in his opinion, writing for this Court, in the *Bouie case*, supra, that the "no evidence" rule of due process articulated in *Thompson v. City of Louisville*, 1960, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654, and asserted by petitioner in *Bouie* "was persuasive but beside the point, for the case in its present posture does not involve the statute "as written." *Id.* 378 U.S. at 350, 84 S.Ct. at 1700.

Petitioner was confronted with the Oklahoma statute "as written" until it was "construed" – a period of time of over two years. As written, he was not a criminal. As construed, he is one, UNLESS federal due process and this Court intervenes.

Petitioner in the case espoused the "no evidence" rule of due process, citing the *Thompson case*, supra, in the court below. Brief of Petitioner in the court below, pages 8 to 17. Upon receipt of the slip opinion of the court below, invoking and relying upon *Bouie*, supra, petitioner's motion for rehearing, inter alia, proposed to the court below that its opinion and affirmance order *conflicted* with this Court's decision in *Bouie*. See petitioner's Appendix B, p. A5, where the mo-

tion for rehearing is appended. The motion was denied. See the order of denial appended as Appendix C, p.A14.

By statutory construction, the court below wrote around the no evidence rule of due process. It had that right, but in doing so it became entangled with another due process rule. The expanded ordinary meaning of the word "seine" constitutes constitutionally impermissable *after-the-act unfair notice* to the petitioner of conduct declared criminal in nature and character. *Bouie*, supra.

On April 22, 1979, the use of nets as a stationary contraption to trap minnows was not inhibited criminal conduct in Oklahoma. An overlength minnow seine and a stationary minnow trap, made in part with nets, are not the same contraption. The contraption in question never had floats on top or sinkers on the bottom that hung vertically in the water and was used to enclose fish when its ends were pulled together.

Very candidly, the court below states that it EXPANDED the ORDINARY meaning of the word "seine". In so acting, the court below was construing state law and therein its jurisdiction was non-federal and was supreme, *Brinkerhoff Faris Trust & Sav. Co. v. Hill*, 1929, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107, but the effect of its construction had to meet the requirement of 14th Amendment due process. *Id.*, *Bouie*, supra. The matter of its operative effect draws in question a due process federal question within the reviewing jurisdiction of this Court. *Brinkerhoff*, supra.

Petitioner's Two Contentions

Number One: Petitioner contends that Oklahoma, in failing to strike from its court's papers the words "and trapping", has deprived him of his property, ($200.00 fine) and liberty (10 days in the county jail) without due process of law. Thereby, Oklahoma convicted petitioner of a crime that does not exist.

Number Two: "As written", in 1979, Oklahoma's Wildlife Code, Title 29, § 6-401-A-1, used the word "seine" in the ordinary everyday meaning when it inhibited seining minnows with a seine longer than 40 feet. As written,in 1979, petitioner had fair notice of its inhibited conduct. Petitioner was charged in 1979 with violating said law and was convicted. On appeal, in 1981, the Criminal Court of Appeals of Oklahoma for the first time construed said law and held that its ordinary meaning had been, by the Legislature, expanded to include several different types of fishing nets; the court concluded that from the evidence, the jury could have reasonably have found that petitioner was using a seine greater than forty feet in length.

Petitioner contends, citing the *Bouie case*, supra, that Oklahoma's *after-the-act notice* of inhibited criminal conduct *judicially expanded* the *ordinary* meaning of the word "seine", and such action fails to constitute due process *fair notice* in light of this Court's decision in *Bouie's Case*.

It cannot be disputed that under the "as written" ordinary everyday meaning of the word "seine", petitioner's contraption was a minnow trap and not a minnow seine.

CONCLUSION

For the foregoing reasons, this Petitition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. M-80-633

CHARLIE E. CONWAY, Appellant,

vs.

THE STATE OF OKLAHOMA, Appellee.

OPINION

CORNISH, Judge:

The appellant was convicted of seining minnows with a seine longer than forty (40) feet. He received a two hundred dollar ($200) fine and ten (10) days in the county jail.

The sole issue on appeal is whether the appellant was using an overlength seine for seining minnows in violation of Title 29 O.S.Supp. 1974, §6-401.

His pivotal argument is that he was not using a seine and therefore his conduct did not come within the purview of 29 O.S.Supp. 1974, §6-401(A)(1). He further argues that his acts constituted the trapping of minnows which is not prohibited by Oklahoma law.

Section 6-401(A)(1) of the Oklahoma statutes, Title 29, prescribes that:

> 1. No seines used for seining minnows may have a mesh larger than one-fourth (¼) inch square, and no such seine shall be longer than forty (40) feet in length.

The statute does not define the word "seine" or "seining". Therefore we must interpret the word in its ordinary everyday meaning to give effect to the general purpose of the statute. *See Phelps v. State*, 598 P. 2d 254 (Okl.Cr. 1979). In Webster's New Collegiate Dictionary "seine" is defined as "a large net with sinkers on one edge and floats on the other that hangs vertically in the water and is used to enclose fish when its ends are pulled together . . ." "Seining" is defined "to catch fish with a seine."

The appellant argues that his net was stationary and did not have floats on one end; therefore, it was not a seine. Webster's definition of a seine describes the type of net used since Biblical times. We find that with modern fishing techniques the ordinary meaning of the word "seine" has expanded to include several different types of fishing nets.

Paul Holland, a Game Ranger for the Oklahoma Department of Wildlife Conservation, was qualified as an expert. Holland has worked with minnow handlers and seines for the past twenty-one years. He testified that, in his opinion, the fishing apparatus used by Conway was commonly known in the industry as a "minnow seine" and that Conway was seining for minnows. Holland further testified that upon his arresting Conway, the appellant inquired, "What have you done with my seines and my traps?"

Scott Davis also testified for the State as an expert witness. Davis has been in the minnow business for twenty-five years. He has seined minnows commercially, and has sold seines to minnow dealers. Davis introduced into evidence a catalog used to order nets and seines. He identified the appellant's net as similar to one of the minnow seines pictured in the catalog.

We are convinced from the expert testimony and the ordinary meaning of a "seine" that the jury could reasonably have found that the appellant was using a "seine" greater than forty feet in length. Since the defintion of "seining" minnows is to fish with a seine, we find that the appellant was properly convicted under 29 O.S.Supp. 1974, §6-401.

The judgement and sentence is AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT
OF KIOWA COUNTY, OKLAHOMA
THE HONORABLE HARRISON ROE, JUDGE

CHARLIE E. CONWAY, appellant, was convicted of seining with a seine longer than forty (40) feet in length in Kiowa County District Court Case No. CRM-79-100. He received a two hundred dollar ($200) fine and ten (10) days in the county jail. AFFIRMED.

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BUSSEY, J., CONCURS.
BRETT, P. J., DISSENTS.

BRETT, P. J., DISSENTS:

I respectfully dissent to this decision. I believe the contraption utilized by appellant was a trap and therefore not covered by the statute. I would reverse and remand this conviction.

AUTHORIZED FOR FILING

November 16, 1981

COURT OF CRIMINAL APPEALS

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
November 16, 1981
Ross N. Lillard, Jr
Clerk

NOT FOR PUBLICATION

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. M-80-633

CHARLIE E. CONWAY, Appellant,

vs.

THE STATE OF OKLAHOMA, Appellee.

PETITION FOR REHEARING

This is a petition for rehearing filed pursuant to Rule 1.18 of the Rules of this Court.

The petitioner-appellant, Charlie E. Conway, prays that this petition be granted, the cause be assigned for rehearing and the Clerk directed to notify both parties, or their counsel, of the time when such will be had, and such time may be given for argument or brief as the Court shall allow.

The appellant shows the court the following in support of this petition:

Grounds No. One

Grounds Number One is based upon the point that the Court's majority has overlooked the application of the case of *Bouie v. City of Columbia*, 1964, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894, and the law therein pronounced, in reaching the decision to affirm the conviction of the appellant.

The Court's majority, in affirming appellant's conviction, construed the word "seine" as used in 29 O.S.SUPP. 1974, §6-401, as follows:

> "We find that with modern fishing techniques the *ordinary meaning* of the word "seine" *has expanded* to include several different types of fishing nets." (Slip opinion, p. 2.). (Emphasis added.)

After stating that the Websterian definition of a "seine" was

> "a large net with sinkers on one edge and floats on the other that hangs vertically in the water and is used to enclose fish when its ends are pulled together . . ." (Slip opinion, p. 1)

the Court's majority held that

> "Webster's definition of a seine describes the type of net used since Biblical times." (Slip opinion, p. 2.)

The Court's majority found:

> "The statute does not define the word "seine" or "seining". Therefore we must interpret the word in its *ordinary everyday* meaning to give effect to the general purpose of the statute." (Slip opinion, p. 1.) (Emphasis added.)

Thus, the Court's majority, in construing the meaning of the word "seine", holds the appellant accountable for conduct under an "expanded", "ordinary everyday meaning" – a more onerous standard than that found in the statute. The "expanded" "ordinary everyday meaning" of the word

"seine" covers a *net* that is *stationary* in the water *without* floats on top and sinkers on the bottom. The ordinary everyday meaning – according to Webster – covers a "net *with* sinkers on one edge and floats on the other that hangs vertically in the water and is used to enclose fish *when its ends are pulled together.*" (Emphasis added.)

No prior Oklahoma case is cited by the Court's majority to support such "expanded", "ordinary everyday meaning". By silence, the Court's majority has rejected the construction placed upon the word "seine" – the Websterian definition – of the Supreme Court of Indiana in 1893, in *State of Indiana v. Lewis*, 134 Ind. 250, 33 N.E. 1024, 20 L.R.A. 52. No case from any other jurisdiction is cited by the Court's majority as a precedent for such "expanded", "ordinary everyday meaning".

Section 1 of Title 25, O.S., which provides:

> "Words used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears, and except also that the words hereinafter explained are to be understood as thus explained",

and, has been applied to penal statutes by this Court in these words:

> A liberal, rather than a technical, construction should be placed on criminal statutes, but courts will not ordinarily by judicial construction *enlarge* scope and operation of penal statute beyond commonly accepted meaning of language of statutes, or beyond its clearly expressed limitations, (Emphasis added.)

in *Magnolia Pipe Line Co. v. State*, 95 Okl. Cr. 193, 243 P.2d 369 (1952), and,

> Penal laws are to be interpreted strictly against state and liberally in favor of accused, and words not found in text criminal statute will not be read in for purpose of *extending* it or giving it an interpretation in conformity with a supposed policy,

in *State v. Stegall*, 96 Okl. Cr. 281, 253 P.2d 183 (1953), together with these words with regard to plain and unambiguous statutes:

> Where the language of a statute is unambiguous and its meaning is evident, the statute must be held to mean what it plainly expresses, and no room is left for the application of rules of construction and interpretation,

in *Ex parte Davis*, 66 Okl. Cr. 271, 91 P.2d 799 (1939), manifestly indicates that the Court's majority has overlooked these laws by the use of an "expanded", "ordinary everyday meaning" of the word "seine" as used in the statute in question.

The statute in question is narrow and precise. It is plain and unambiguous.

If the ordinary everyday meaning of the word "seine" was ambiguous and uncertain, the law in question would be void for vagueness. The *expanded* construction by the Court's majority is a necessarily implied admission that the word "seine" is ambiguous and uncertain. No doubt the Court's majority has overlooked this fact in expanding the ordinary everyday meaning of the word "seine".

Surely, the Court's majority never intended to transcend 25 O.S. §1, and the prior decisions of this Court in expanding the meaning of a word that is plain and unambiguous.

Can it be debated that the word "seine" is uncertain and ambiguous? It is *not* debatable. If it is debatable, then it is void for vagueness and such voidness is for the Legislature to cure and not for the Courts. "[J]udicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." *Pierce v. United States*, 1941, 314 U.S. 306, 311, 62 S.Ct. 237, 239, 86 L.Ed. 226.

The statute, said to be violated, on its face is narrow and precise. The inadvertent affect of the Court's majority view upon the appellant is succinctly stated in the *Bouie* opinion, 378 U.S. at 352, 84 S.Ct. at 1702, as follows:

> "When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required "to speculate as to the meaning of penal statutes," as in Lanzetta, or to "guess at [the statute's] meaning and differ as to its application," as in Connally, *the violation is that much greater* when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question."

Until this Court's majority, by an unauthorized construction, has *expanded* the *ordinary everyday meaning* of the word "seine", the appellant was accountable for the ordinary everyday standard of conduct found stated in the dictionary of Mr. Webster defining the word "seine". The Legislature is deemed to have intended the meaning given by Mr. Webster unless the contrary is shown. 25 O.S. §1.

Since the record in this case makes it crystal clear that the standard of conduct of the statute, which binds the appellant and Court alike, pre-dates the date of the expanded meaning determined by the Court's majority; and since the date of the appellant's conduct pre-dates the date the Court's majority expanded the ordinary everyday meaning, appellant contends that by applying such expanded construction of the statute to affirm his conviction in this case, that the State has punished him for conduct that was not criminal at the time he committed it, and hence, has violated the requirement of the Due Process Clause, (14th Amendment), that the criminal statute give fair warning of the conduct which it prohibits. (*Bouie's* case, 378 U.S. at 350, 84 S.Ct. at 1701.)

Unless the affirmance of the conviction be reversed, the Court's majority view has, no doubt inadvertently, operated as a judicial Ex Post Facto Clause, condemned in *Bouie v. City of Columbia*, supra, as a violation of the 14th Amendment, due process.

In addition, within the rule of *Brinkerhoff-Faris Trust & Co. v. Hill*, 1929, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107, this alleged invasion of constitutionally protected rights has arisen for the first time in this Court; and, has been timely objected to by this Petition for Rehearing.

Grounds No. Two

The Court's majority, in affirming the conviction of the appellant, has overlooked a constitutionally grave error in the conviction. The constitutionally grave error is found in the fact that the appellant was convicted of a crime that does not exist:

The appellant was convicted by:

(1) an information,
(2) an instruction to the jury,
(3) a verdict of the jury,
(4) a judgment and sentence,

of *seining and trapping* minnows in violation of 29 O.S.SUPP. 1974, §6-401(A)(1). In each and every one of the above named written four procedural steps, the words used were *"seining and trapping minnows"* in violation of the statute in question. *That statute does not make seining and trapping minnows an offense.*

In the trial court and in this Court, this error was properly and timely objected to by the appellant.

The conviction and affirmance thereof by the majority of this appeal court of a *crime that does not exist* is an invasion of the appellant's right to 14th Amendment due process.

The general rule recognized in *Re Graham*, 138 U.S. 461, 11 S.Ct. 363, 34 L.Ed. 1051, quoted and affirmed in *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 555, 54 L.Ed. 793,

> "that a judgment rendered by a court in a criminal case must conform strictly to the statute, and that

> any variation from its provisions, either in the character or extend of punishment inflicted, *renders the judgment absolutely void*" (Emphasis added.)

has been overlooked by the Court's majority.

The *enforcement of a void judgment* is an act repugnant to the due process clause of the 14th Amendment. *Scott v. McNeal,* 154 U.S. 34, 14 S.Ct. 1108, 38 L.Ed. 896. This rule has been overlooked by the Court's majority.

Under the general rule, stated above, the jurisdiction of the trial court was never invoked by instituting the action by an information that charged a crime that never existed.

Since the undisputed evidence showed that the contraption used by the appellant was a minnow trap, the instruction to the jury that the defendant was charged with *seining and trapping minnows* in violation of a statute was, *in practical operation*, an instructed verdict to find the appellant guilty.

Relief Requested

Petitioner prays, upon the grounds stated above, that his conviction and the affirmance thereof by this Court's majority be vacated, set aside and reversed and remanded.

Respectfully submitted,

/s/ R. M. Helton
R. M. Helton,
Petitioner's counsel,
713 Lamar St.,
Wichita Falls, TX, 76301.

CERTIFICATE OF SERVICE

I, R. M. Helton, counsel named above, certify that on December 5, 1981, that two copies of the above and foregoing Petition for Rehearing was mailed, U.S. Mailed, Express Mail Class, properly addressed and with sufficient postage, to the Office of the Attorney-General, State of Oklahoma, State Capital Building, Oklahoma City, OK, 73105.

/s/ R. M. Helton
R. M. Helton.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
December 7, 1981
Ross N. Lillard, Jr
Clerk

APPENDIX C

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. M-80-633

CHARLIE E. CONWAY, Petitioner,

vs.

THE STATE OF OKLAHOMA, Respondent.

ORDER DENYING PETITION FOR REHEARING AND DIRECTING ISSUANCE OF MANDATE

On December 7, 1981, a petition for rehearing was filed in the above styled and numbered cause and this Court having carefully considered the same;

NOW THEREFORE, this Court finds that the petition for rehearing should be, and hereby is, DENIED, and the Clerk of this Court is directed to issue the MANDATE FORTHWITH.

Dated this 4th day of January, 1982.

/s/ HEZ J. BUSSEY
HEZ J. BUSSEY, JUDGE

/s/ TOM R. CORNISH
TOM R. CORNISH, JUDGE

ATTEST:

/s/ ROSS N. LILLARD, JR.
CLERK

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
January 4, 1982
Ross N. Lillard, Jr
Clerk

APPENDIX D

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

No. M-80-633

CHARLIE E. CONWAY, Petitioner,

vs.

THE STATE OF OKLAHOMA, Respondent.

MOTION FOR STAY OF MANDATE

Charlie E. Conway, the petitioner above-named, respectfully presents this, his application for, and moves this Court to enter an order staying the mandate ordered issued on the 4th day of January, 1982, in the above-entitled cause for a reasonable period of time.

This motion is made under the provisions of Section 2101(f), Title 28,* to enable the petitioner to apply for and obtain a writ of certiorari from the Supreme Court of the United States.

The grounds on which the petition for certiorari will be based are as follows:

(1) Violation of 14th Amendment Due Process in that he was convicted

(a) of a crime never proved; and,
(b) of a crime that does not exist; and,
(c) of a crime under a statute that did not give him fair warning of the conduct which it prohibits; and,

(d) of a crime under a statute that has been construed by this Court in a manner that constitutes the judicial creation of an ex post facto law.

The stay of enforcement herein is necessary because otherwise his right to bail pending his appeal to the Supreme Court of the United States will be denied and his confinement to jail would be unlawful if his conviction would be appealed to the Supreme Court of the United States and reversed. His present security for bail is cash and under Section 3144 of Title 18, United States Code, he is entitled to be not confined until a final judgment upon such review.

Respectfully submitted this the 7th day of January, 1982.

/s/ R. M. Helton
R. M. Helton,
Petitioner's counsel,
713 Lamar St.,
Wichita Falls, TX, 76301.

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* United States Code.

NOTICE OF MOTION

To the Attorney-General,
State of Oklahoma,
State Capitol,
Oklahoma City, OK

Please take notice and be advised that the undersigned, R. M. Helton, has, concurrently with the giving of this notice, filed the above and foregoing Motion for Stay of Mandate in the above-entitled and numbered cause, and has requested that the same be decided and ruled upon as soon as petitioner's counsel can be heard.

CERTIFICATE OF SERVICE

I, R. M. Helton, counsel named above, certify that on January 7, 1982, and immediately prior to the filing of the above and foregoing Motion for Stay of Mandate in the above-entitled and numbered cause that two Xerox copies of the same were served upon the Attorney-General State of Oklahoma, by hand delivery of the same to his office and to his outer office receptionists..

/s/ R. M. Helton
R. M. Helton,
Petitioner's counsel,
713 Lamar St.,
Wichita Falls, TX, 76301.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
January 7, 1982
Ross N. Lillard, Jr
Clerk

APPENDIX E

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. M-80-633

CHARLIE E. CONWAY, Appellant,

vs.

THE STATE OF OKLAHOMA, Appellee.

ORDER WITHDRAWING MANDATE PENDING APPEAL TO UNITED STATES SUPREME COURT

Now on this 7th day of January, 1982, the above appellant having filed his application to withdraw the mandate issued by this Court concerning Kiowa County Case No. CRM-79-100; and having shown to this Court that necessary steps to accomplish an appeal to the United States Supreme Court for writ of certiorari has been undertaken. This Court finds that the mandate issued herein should be withdrawn pending a determination to be made by the United States Supreme Court.

IT IS THEREFORE ORDERED that the mandate issued January 4, 1982, shall be withdrawn until the further order of this Court. IT IS FURTHER ORDERED that appellant shall remain free on present bail under the further order of this Court.

/s/ TOM BRETT
TOM BRETT, PRESIDING JUDGE

/s/ HEZ J. BUSSEY
HEZ J. BUSSEY, JUDGE

/s/ TOM R. CORNISH
TOM R. CORNISH, JUDGE

ATTEST:

/s/ ROSS N. LILLARD, JR.
CLERK

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
January 7, 1982
Ross N. Lillard, Jr
Clerk

APPENDIX F

Title 29
Chapter 1
Oklahoma Wildlife Conservation Code
Article VI Fish and Water Species
Part 4. Minnow Dealers

§ 6-401. Operating provisions for minnow dealers

A. No person may seine, trap, transport and/or sell any minnows within this state without having a valid minnow dealer's license unless exempted under Section 4-116 and without observing the following requirements:

1. No seines used for seining minnows may have a mesh larger than one-fourth (¼) inch square, and no such seine shall be longer than forty (40) feet in length.

2. No licensee may employ more than four (4) helpers or assistants in his seining and trapping operations, and each helper or assistant must possess a valid Oklahoma Fishing License.

3. No dealer or his employees may seine and trap in any river, stream or lake of Oklahoma without having first obtained written permission for such from the owners or tenants of the lands through which such waters flow or lie, and any written permit obtained by the dealer must be upon his person while being upon such lands.

4. All vehicles used to transport minnows by a licensee in accordance with Sections 4-115 and 4-116 must be equipped in such manner as to aerate the water in the containers by pressure methods and such vehicles shall be marked

conspicuously by decals bearing the inscription "Commercial Minnow Dealer," such decals to be furnished by the Department, to be placed on the center of each door, and to be defaced in no manner.

5. All licensees shall send to the Department a true annual summary of all fish and other bait species captured.

B. Any person convicted of violating the provisions of this section shall be fined not less than One Hundred Dollars ($100.00) nor more than Two Hundred Dollars ($200.00), or confined in the county jail for a period not to exceed thirty (30) days, or by both such fine and imprisonment.

Laws 1974, c. 17, § 6-401, eff. April 8, 1974.

APPENDIX G

CONSTITUTION OF THE UNITED STATES AMENDMENT XIV.

Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

APPENDIX H

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

No. PC-80-633

CHARLIE E. CONWAY, Appellant,

vs.

THE STATE OF OKLAHOMA, Appellee.

PETITION IN ERROR

For his petition in error, the appellant alleges:

(a) The trial court from which appeal is being lodged is the District Court of Kiowa Country, Oklahoma.

(b) The crime for which appellant was convicted is the misdemeanor of seining and trapping minnows with a seine over 40 feet in length.

(c) The Judgment and Sentence imposed was fine of $200.00 and confinement in the county jail for 10 days.

(d) The amount of the bail was fixed at $165.00. Appellant is free on bail.

(e) The errors of law urged as having been committed during the process of the trial are as follows: (Germaine to the Motion for New Trial).

1.

Error in overruling his motion to strike.

2.

Error in refusal to grant his motion for acquittal at the close of the evidence of the State.

3.

Error in submitting the case to the jury.

4.

Error in charge to the jury noted in the margin of the charge.

5.

Error in refusing to submit defendant's specially requested instruction defining the word "seine".

6.

Error in the verdict, judgment and sentence, in that the same is contrary to law.

(f) Nature of relief appellant seeks is: Reversal with direction to dismiss. Alternatively, reversal with respect to the Verdict, Judgment and Sentence fixing punishment of confinement in the County jail of 10 days and affirmance of the $200.00 fine.

Respectfully submitted,

By /s/ R. M. Helton
R. M. Helton
HELTON & SOUTHARD,
713 Lamar Street,
Wichita Falls, TX, 76301,
Tel. #817-723-0729,

Attorney for appellant.

CERTIFICATE OF SERVICE

I, R. M. Helton, counsel named above, certify that on Sept. 19, 1980 that a Xerox copy of the above and foregoing was served upon the Attorney General, State of Oklahoma, by mailing same to him at his offices in the Capitol Building, Oklahoma City, OK, in the U.S. mail, first class, properly addressed and with sufficient postage.

/s/ R. M. Helton
R.M. Helton.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
September 22, 1980
Ross N. Lillard, Jr
Clerk

APPENDIX I

STATE'S EXHIBIT # 2

STATE'S EXHIBIT # 3

STATE'S EXHIBIT # 4

STATE'S EXHIBIT # 5